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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division

AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC. IN SUPPORT OF POSITION OF APPELLANTS

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This amicus curiae brief is filed on behalf of the Consolidated Milk Producers of San Francisco, Inc. (hereinafter called Consolidated) in support of the brief filed in this action by appellants which, at

the direction of this Court, treats both with the question of the jurisdiction of this Court over the controversy and with the merits of the several questions raised by it.

Pursuant to Rules of this Court, consent for the filing of this brief has been granted by all parties to this action and these consents have been filed with the Court concurrently with the filing of this brief.

THE INTEREST OF CONSOLIDATED IN THE LITIGATION

Consolidated is a non-profit corporation representing nearly 300 independent milk producers located in northern California. Approximately ten per cent of the output of its members is distributed to processing cooperatives; the balance is sold to commercial or conventional distributors. This is approximately in proportion to the statewide pattern of the distribution of fluid milk. Members of Consolidated are responsible for approximately ten per cent of the total production of fluid milk in California.

The primary purpose of Consolidated has been to provide its members with a means by which, through democratically elected representatives, they can deal with problems involved in the production and marketing of their products.

Reflecting the wishes of its members, Consolidated played a significant role in securing the enactment of the California Milk Stabilization Act[1] and in support-

[1]California Agricultural Code, Sec. 4200 et seq.

ing the stabilization programs adopted by the State Director of Agriculture under its authority.

The present Milk Stabilization Program has resulted from recognition by all segments of the milk industry, including dairy farmers such as those represented by Consolidated, and the public as well, that Government action was essential to enable the industry to provide the public with an adequate supply of milk at fair and reasonable prices which met sanitary and health requirements.

Professor J. M. Tinley in his authoritative study of the California milk industry has characterized two of the basic problems which confronted it:[2]

> "The gradual concentration of population in large cities has given rise to two important groups of problems: The first connected with the physical handling of milk and the protection of the health of consumers, and the second with economic relations between producers, distributors and consumers."

This Court has, in the landmark decision in *Nebbia v. New York*, 1933, 291 U.S. 502 at 517, recognized the perennial oversupply of fluid milk which contributes to the instability of the industry:

> "The fluid milk industry is affected by factors of instability peculiar to itself which calls for special methods of control. Under the best practical adjustment of supply to demand the industry must carry a surplus of about 20%, because milk, an essential food, must be available as demanded

[2]Tinley, Public Regulation of Milk Marketing in California (1938), p. 2.

by consumers every day in the year, and demand and supply vary from day to day and according to season; but milk is perishable and cannot be stored . . . thus surplus milk presents a serious problem as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream . . ."

The continued oversupply of fluid milk resulted in cut-throat competition between distributors and producers which became particularly acute during the depression years of the 1930's. The effect of this price competition resulted in both distributors and producers sustaining substantial losses. Inevitably, the independent milk producers, being small in size and at a disadvantage in bargaining with the distributors, assumed a large part of the burden to the point where their very existence was in peril:

". . . the rivalry between distributors for wholesale business led to the granting of certain services and concessions to wholesale customers, mainly stores and restaurants . . . [p. 26] as the struggle continued . . . wholesale margins declined to such a degree and cost of distribution (because of expensive services) increased so rapidly that none but a few distributors with the best of the wholesale trade were able to avoid losses . . . [p. 27] since 1930, large numbers of distributors in each market have been forced either to pass their increased cost on to producers in the form of a lower price or to suffer severe losses. . . . During the more severe milk wars . . . distributors often deducted their cost of operation from the reduced returns from the sale of milk

> and passed the rest on to producers. Producers involuntarily subsidized the intensive price cutting . . . as a general rule, they had no alternative but to take any price above manufacturing-milk prices that was offered to them. . . . [p. 29] . . . in 1932 and 1933, conditions had come to such a pass that producers were arrayed against producers as well as against distributors; and distributors against distributors a well as against producers . . .'' [p. 31] (*Tinley, supra,* pages 26-31).

It was then that producers and distributers turned to the Government for assistance in achieving stability in the marketing of milk.

The Agricultural Adjustment Act[3] was passed in 1933 giving the Secretary of Agriculture power to enter into marketing orders with producers and distributors engaged in interstate or foreign commerce of dairy products and providing further for the licensing of the distributors and producers handling such products. These Federal Marketing Orders provided for maintenance of minimum prices to be paid to producers and distributors for different classes of milk and further for marketing pools.

When it appeared that the Federal program could not control local markets, the industry turned to the states for legislative action. In 1935, the California legislature adopted legislation[4] empowering the Director of Agriculture to establish minimum prices which the producer must be paid upon adoption of a mar-

[3] 7 U.S.C. 601.

[4] California Agricultural Code, Sec. 4200 et seq.

keting and stabilization plan for a given area. This Act eliminated one of the main causes of ruinous price competition by stabilizing the prices paid by all distributors to producers for their milk.

Experience with exclusive producer price stabilization plans under the 1935 Act pointed out "that demoralized market conditions had resulted in numerous uneconomic trade practices which distributors in spite of continuous and strenuous efforts had been unable to eliminate, 'and which' in the long run would benefit neither consumers nor distributors and might eventually undermine even producer prices." (*Tinley, supra*, 78.)

The California legislature recognized the problems in 1937 by amending the State Milk Stabilization Act to authorize the Director of Agriculture to establish a minimum wholesale and retail price for milk in any area in which a marketing plan was in effect.[8] Producers, including Consolidated, were among those who urged the legislature to expand the program because they recognized that without industry-wide stability the producer pricing program was in peril.

Philosophically, the legislation is part of the "self-help" programs for agriculture which characterize marketing order legislation in California, the Federal government, and other states as well. Thus, the Director of Agriculture is authorized to divide the state into "marketing areas"[9] and, upon approval of

[8] Stats. 1937, Ch. 413, p. 1342.

[9] California Agricultural Code, Sec. 4274.

65% of the producers of "market milk" in a marketing area to establish a stabilization plan for it.[7] Each of the price stabilization plans with which we are concerned in this litigation was approved by the requisite number of milk producers.

For such an area, the director establishes minimum prices which distributors must pay producers[8] and minimum wholesale and retail prices for fluid milk.[9] In establishing such prices, he must observe certain specified criteria. Further, he must find such prices:

> "insure consumers an adequate and continuous supply of pure, fresh, wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed for normal fluctuations in production and in consumer demand for fluid milk, cream and skim milk for such marketing area."[10]

While changes have occurred in the national and state economy and in the distribution of fluid milk since the adoption of this legislation, basic problems continue to exist which have induced the state legislature not only to retain the program but to strengthen and improve it. The success of this approach to the peculiar problems of the fluid milk industry is indicated by the fact that similar marketing orders are now in effect in 23 other states, and in many areas under the authority of Federal legislation.

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[7] California Agricultural Code, Sec. 4271, 4272, 4273, 4351.
[8] California Agricultural Code, Sec. 4240.
[9] California Agricultural Code, Sec. 4351.
[10] California Agricultural Code, Sec. 4281.

In the late 1950's, distributors engaged in a vigorous economic competition for the military market. Military purchases for troop rations and resale in commissaries amounted to slightly over 6% of the total sales of fluid milk in California, they offered an important means by which distributors could dispose of excess market milk. As the struggle for the military market progressed, bid prices fell below the established minimum prices for sale by wholesalers.

When the State of California sought to enforce its minimum prices at the producer and wholesale levels with respect to milk delivered to the three military installations involved here, the United States brought this action.

In November of 1960, the District Court below declared unconstitutional both the producer and wholesaler minimum price regulations as applied to milk delivered to these installations. Distributors now felt free to disregard producer minimum prices and a price war resulted. Once again producers bore the burden of the price-cutting among distributors. Because of their unequal bargaining position, they were compelled to accept as the price for such milk what remained after the processor deducted the cost and profit of processing. The return to producers fell from the minimum price of $5.19 per hundredweight to as low as $2.75 per hundredweight. This resulted in their selling such milk for as much as $2.00 per hundredweight below their cost of production.

A significant portion of the total production of fluid milk in California is distributed to military in-

stallations such as those involved here. There is no market-wide pooling of milk and, consequently, the burden of producing substantially below cost for the military falls unequally upon producers with disastrous economic effect.

In August of 1961, Justice Douglas of this Court issued an order staying the injunctions of the District Court which restrained appellants from enforcing the state minimum producer prices. Following this action, the successful bid prices for the military market rose but were still below the established minimum wholesale prices and were also below the total of the cost to the producer and distributor of producing and processing the milk. The distributors are now delivering milk to the military installations at a loss. If this condition continues, industry-wide instability must result and the purposes of the California Milk Stabilization Program will be defeated. Thus, with respect to the deliveries to the military installations involved, even under the partial stay, the milk industry is essentially in the same position as it found itself in 1937. The economic reasons which led the entire industry, including Consolidated representing independent milk producers, to support an industry-wide minimum pricing program are as compelling now to the producers as they were then.

Many of the members of Consolidated have sustained serious financial losses as a result of the decision of the District Court. All are deeply concerned that the entire milk stabilization program providing for minimum prices at the distributor levels as well

as at the producer levels continue in effect. Consequently, Consolidated, in behalf of the many independent milk producers who compose its membership, has a direct and profound interest in the pending litigation.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT IMPROPERLY DENIES TO CALIFORNIA THE AUTHORITY TO PROTECT THE HEALTH AND WELFARE OF ITS RESIDENTS BY ENFORCEMENT OF MINIMUM PRODUCER PRICES AND MINIMUM DISTRIBUTOR PRICES FOR THE SALE OF FLUID MILK USED AS TROOP RATIONS AND FOR RESALE TO MILITARY PERSONNEL ON CERTAIN MILITARY INSTALLATIONS.

We concur with the arguments of Appellants treating both with the reasons why it is urged that this Court assume jurisdiction of this direct appeal and further why the decision of the District Court should be reversed. We concur, too, with the statement of the questions presented by this litigation set forth in Appellants' brief. No useful purpose will be served by dealing with all phases of these questions in view of the comprehensive and effective brief of Appellants. Without minimizing the importance of any argument made by them, this brief will be limited to certain aspects of these questions.

This action turns on the question of whether the minimum price regulations established under the California Milk Stabilization Act can be applied constitutionally to the sale of milk by the original producer to a distributor and in turn by the sale of that

distributor to the United States for use as troop rations or resale. The decision of the District Court from which this appeal has been taken was in the negative in both respects.

At the outset, we wish to call this Court's attention to the failure of the District Court in its opinion to discuss or explain how logic or precedent could conceivably justify its decision with respect to sales by dairy farmers to distributors which in every instance were negotiated and consummated at some distance from the military installations here involved. Yet the Court in its Memorandum Opinion makes it clear that it was at all times considering both the producer and distributor minimum price regulations. This is clear both from the body of the Opinion and the Order and Injunction subsequently issued pursuant to it.

The Solicitor General has contended that since the United States, after Appellants filed their Jurisdictional Statement and Consolidated intervened as amicus curiae, has now changed its procurement policy to permit the state to enforce minimum *producer prices*, this Court need no longer consider the constitutional question there involved. The proposal of the Solicitor General has not altered what is before this Court, which is an appeal from a decision of record of the United States District Court to the effect that California cannot constitutionally enforce either its producer or distributor minimum price regulations with respect to milk ultimately used on the military installations involved here.

Deletion of that portion of the order which restrains enforcement of minimum producer price regulations, as suggested by the Solicitor General, will not diminish the significance of the District Court decision as a precedent in the event that tomorrow Federal procurement officials elect to change Federal procurement policy once again. We call to the attention of the Court that the Solicitor General has not conceded that California can regulate producer prices over the objection of the Federal Government. Unless the decision of the District Court is reversed, it remains as a sword of Damocles poised over the heads of the milk industry.

A.

THE CALIFORNIA MILK STABILIZATION ACT AND MINIMUM PRICE PROGRAMS DO NOT IMPOSE A PROHIBITION UPON THE FEDERAL GOVERNMENT NOR DO THEY CONFLICT WITH FEDERAL POLICIES.

We respectfully submit that the District Court erred in declaring that the State of California (and, therefore, all other states) may not under the Federal Constitution, apply its milk stabilization programs to sales by dairy farmers to their distributors and by those distributors to certain military installations where the milk is used as troop rations and for resale. The rationale of the Court was that the state price regulations conflicted with Federal procurement policy and further that the State imposed direct penalties on the Federal Government and its officers if they purchased milk at less than the established prices.

We believe that the District Court placed a strained interpretation upon the act in finding that, under it California imposes penalties on the Federal Government if it purchases milk at less than the established minimum prices. We believe that it has misunderstood the Federal procurement policies with which it found the California milk stabilization to be in conflict. We further believe that in striking down a program which California has long considered to be essential for the health, safety and welfare of its residents, the District Court has disregarded the established policy of this Court that restraint must be exercised in finding an otherwise valid exercise by a State of its police powers to be violative of the Federal Constitution. This policy has been the very cornerstone of our Federal system of government in which both the Federal Government and the various state governments enact legislation for the health and welfare of the public to meet problems in our constantly changing and dynamic society.

1. The Milk Stabilization Program Does Not Impose a Prohibition Upon the Federal Government.

The Act makes the violation of any provision of it or of any stabilization and marketing plan or any order of the Director of Agriculture or of any of the unfair practices thereof a misdemeanor.[11] The District Court relied upon the italicized phrase in the following section of the California Agricultural Code for its conclusion that the Federal Government and

[11]California Agricultural Code, Sec. 4410.

its procurement officers as purchasers of milk from distributors at the various Federal military reservations were subject to criminal prosecution if they purchased milk at less than the established minimum prices:

> "4361. . . . no retail store, restaurant, confectionery or *other place for consumption on or off the premises* shall purchase from any distributor or sell to any consumer any fluid milk or fluid cream, or either of them, at less than the prices as established by the Director under the provisions of this Article. . . ." (Emphasis supplied.)

The Court then relies upon *California Commission v. United States*, 355 U.S. 534 (1958), as dealing with an analogous situation. It disposes of *Penn Dairies Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), by suggesting that this Court overruled it in the *California Commission* case and, further, that, in any event, it is not applicable because the California Act "places a prohibition on the Federal Government" within the meaning of the *California Commission* case.

It is significant that the District Court reasoned that "the language of these Sections *is broad enough to include the Federal Government.*" (Emphasis supplied.) It could not find an express reference to the Federal Government because, in fact, none exists in the Act or the Minimum Price Regulations issued pursuant to it and which are pertinent here. It did not find that the State of California had in this or any other instance attempted to apply sanctions against the Federal Government or its agents because,

in fact, no such interpretation or application of the Act or the price regulations has ever been made.

In holding that the phrase "other place for consumption on or off the premises" included the Federal Government and its agents and made them subject to criminal sanctions of the State, the District Court imposed a strained interpretation upon the language of the Act in order to find it unconstitutional. It disregarded the fact that in the *California Commission* case, as distinguished from the instant case, there is *express* reference to the United States in the statutes there considered. It assumed that the California Legislature intended and sought by a "catch-all" clause to make military officers of the United States Government purchasing military supplies in the performance of their official duties subject to penal provisions of the State legislation.

The District Court also erred in adopting a construction of the Act from which it concluded that it was unconstitutional, when another interpretation to which it was readily susceptible would have led to the opposite result. *Sully v. American National Bank* (1900) 178 U.S. 289 at 300. It failed also to apply the principle that the entire scheme of the statute should be considered. *Savage v. Jones*, 225 U.S. 501 at 533 (1911).

The method by which the Director of Agriculture accomplished the purposes of the Milk Stabilization Act was to establish minimum prices at various sales levels. The incidence of the enforcement program fell upon the distributors. The program was not intended

to regulate the army nor did it in fact. The Supreme Court of the State of California has so construed the Act in *Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818 (1942), in which it duly noted that in an amicus curiae brief filed in behalf of the United States, the United States Attorney had contended that the application of the Act to sales of milk to the military would unduly burden the operation of an essential arm of the Federal Government:

> "The Act regulates not the army but the distributors who are independent contractors with the Federal Government. It is settled that such contractors are subject to State control, and that any consequent burden on the Federal Government is speculative and remote. . . . *James v. Dravo Contracting Company*, 302 U.S. 134" (page 829.)

There is no question but what the State of California has sought to make the established minimum prices applicable to sales of milk which ultimately reach the United States military installations. It sought to enforce these prices by action against distributors who disregarded the minimum prices in making sales to the military, not against the agents of the United States who made such purchases. In taking action against distributors to enforce the program, it did not discriminate between the United States Government and any other purchaser. The prices which the Director established as fair and reasonable were applied to all sales by distributors. In this respect, the military in purchasing milk for

its troops and for resale was paying no more than the other customers of those distributors.

Essentially, this is what the United States has taken exception to in this case. The military personnel have objected to the fact that if the distributors of fluid milk from whom they make their purchases are compelled to respect the minimum prices which California has made applicable to all sales in a marketing area, they would pay more for their milk than if an exception were carved into the program for their benefit. In effect, the armed forces feel that they should be entitled to the benefits of a healthy milk industry at the expense of the civilian population of California.

If the financial burden upon distributors of milk resulting from their observing minimum producer prices is in turn a burden upon the Federal Government, it is at most "a burden which is consequential and not one that is necessary, immediate or direct. . . ." *Trinity Farm Company v. Grosjean*, (1933) 281 U.S. 466.

The Pennsylvania Milk Control Law considered by this Court in the *Penn Dairies* case is substantially similar in purpose and method to the California Act. There too, as the Pennsylvania Supreme Court pointed out, incidence of the law falls upon the dealers, not the military:

> "The Milk Control Law is not directed against the Indian town gap reservation. If the objects of the law are realized, the reservation will benefit in common with the community in general . . .

there is no burden upon it which does not fall upon all users of milk, including institutions of this commonwealth. . . . no attempt is made in the law or in the order of the Board to give any order or direction to the reservation or its officers. The incidence of the law is upon the dealers of milk." *Penn Dairies v. Milk Control Commission*, (1942) 148 Pa. Super 261, 270-1.

This Court in its review of that case did not find the economic burden which the military there assumed to be a prohibition upon the Federal Government.

The essential difference between an indirect economic burden and a direct restraint which so impairs the functions of an arm of the Federal Government as to constitute a prohibition is illustrated by the *California Commission* case. There California, through its Public Utilities Code, provided that if the United States sought to negotiate rates for shipments of Federal property at below the established price schedule, it would be required to submit the proposed reduced rates to the discretionary authority of the state Public Utilities Commission. First, it should be noted that this legislation *clearly and expressly* referred to the United States. Secondly, this Court in its decision clearly pointed to the "seriousness of the impact of (the) regulation on the action of Federal procurement officials . . .":

"It is the practice of the Government not only to negotiate separate rates which vary from the class or 'paper weight' but also to negotiate a 'freight of all kinds' rate which will cover hundreds of diverse items for the supply of a divi-

> sion of the army or for a vessel that are needed at one place at one particular time. There is not provision in the California Code or Regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished.
>
> This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made. General Edmund C. R. Lasher testified at the trial 'for us to make these arrangements . . . let us say 48 states with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never find our way, we would never win the war.'" (pages 644 to 646.)

The difference between the burdensome restraints which the State sought to impose upon the military in the *California Commission* case and the indirect economic burden imposed upon the military in the *Penn Dairies* case, and in the instant case as well, is so striking that we are at a loss to understand how the District Court could conclude that the *California Commission* case is analogous and controlling here.

Finally, we contend that if the District Court was correct in interpreting the phrase "other places" to include the United States, it should have limited its finding of invalidity to an application of the Act to the United States or its agents.[12] The California legislature clearly contemplated a divisible statute. This is apparent from the consideration of the entire regulatory scheme since invalidity of enforcement against the United States and its agents would not interfere with the efficacy of the Milk Stabilization Programs promulgated under it so long as they could be enforced against producers and distributors.

2. The Minimum Price Regulations Do Not Conflict With Federal Procurement Policies.

It has long been settled that "in the application of the principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together." *Sinnot v. Davenport*, 22 How. 227, 243; *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

In the *Penn Dairies* case, supra, this Court held that Pennsylvania pursuant to its Milk Control Act could establish the wholesale price of milk which distributors were bound to observe even though the purchaser was the United States Army. In so holding, this Court stated:

> "To establish such a conflict the Government places its reliance on acts of Congress requiring

[12] California Agricultural Code, Sec. 4420.

> competitive bidding in the purchase of supplies for the army . . . it is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish army supplies and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations and with the acceptance by government officers of the regulated price where that is the lowest. . . ." (pages 271-272.).

The California Milk Stabilization Act and the Pennsylvania Milk Control Act considered in the *Penn Dairies* case are similar.

In the instant case the Armed Forces Procurement Act in its competitive bid provisions do not purport to set aside these local price regulations of milk in California. The requirement for competitive bidding contained in 10 USC Sections 2301 to 2314 is no more contrary to the minimum price regulations of the California Milk Stabilization Act than the competitive bid requirements passed upon in the *Penn Dairies* case were to the Pennsylvania Milk Control Act. The Congressional history of the legislation indicates that it was intended to eliminate abuses in purchasing practices by the government and to assure the government of fair and reasonable prices.

Senate Report No. 571 states of the Armed Services Procurement Act of 1947:

> "This bill, as amended, provides for a return to normal purchasing procedures through the advertising bid method on the part of the armed services . . . it capitalizes on the lessons learned during wartime purchasing . . . a quote from the House report presents this concept of the bill and applies equally to the bill as amended . . . 'the bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies . . . it holds to the time tested method of competitive bidding . . . it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the government of fair and reasonable prices for supplies and services procured' . . ."[5]

As the Senate Report indicates, the law was designed to eliminate abuses in selling to the United States and to insure the government fair and reasonable prices. No question has been raised but what the minimum prices established by the California Director of Agriculture were fair and reasonable. Further, it would be ridiculous to contend that observance of state minimum prices for milk in procurement policy is an abusive practice with which the Congress was concerned.

In reversing its procurement policy after the instant litigation was commenced to the extent that California's minimum producer prices will be observed by military procurement officials, the United

[5] U.S. Code Congressional Service 1948, 80th Congress, 2nd Session.

States government has itself recognized the absence of any conflict between the California Milk Stabilization Programs and the Federal Procurement policies and procedures.

It is apparent that not only is there no conflict between the California Milk Stabilization Programs and the Military Procurement Acts which is direct and positive as required by *Reed v. Colorado*, supra, but neither is there any evidence either in the language of the Armed Services Procurement Act or in its legislative history to indicate that Congress intended to change the laws established in the *Penn Dairies* case.

In fact, Congress, under its powers to regulate interstate commerce, has attempted to stabilize the interstate milk industry by laws somewhat similar to those of California.[1] Under these laws, minimum prices are established through marketing agreements covering the sale of milk by producers. Where these marketing orders are in effect, procurement policy has been to recognize the established minimum prices for the milk.

California and its sister states are attempting to do on a local scale what the United States is attempting to do on a national scale, namely, to stabilize the milk industry by establishment of minimum prices.

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[1] 7 U.S.C. 601

B.

CALIFORNIA HAS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS FOR ENFORCEMENT OF MINIMUM DISTRIBUTOR PRICE REGULATIONS WITH RESPECT TO MILK DELIVERED TO THESE INSTALLATIONS.

The District Court herein has determined that the military bases in question are under the exclusive jurisdiction of the United States and thus the California Milk Stabilization Laws cannot be enforced.

The Solicitor General in his Memorandum for the United States (p. 7) states "This conclusion is, we think, not open to serious challenge", and further that there is no need for an examination of California statutes which "ex hypothesi, have only local application". These statements, and the Court's decision, are based primarily on an opinion of an earlier California Attorney General. (23 Ops. Cal. Atty. Gen. 14.)

We submit the opinion was manifestly in error and the position of the Solicitor General untenable since he relies on an opinion construing the very statutes which "need no review". (Memo U.S. p. 7.)

The United States may acquire *land* by purchase, condemnation or cession. Such acquisition of *title to land* does not, per se, give the Federal government "jurisdiction" over such land. The framers of our Constitution recognized the inherent dangers in the power of the Federal government to acquire land and provided for safeguards in the form of consent by state legislatures to such purchases, which consents can be limited and qualified. (*James v. Dravo Contracting Co.*, 302 U.S. 134.) Early enactments of

the United States Congress give note to this distinction, as in the Act of March 3, 1819, "Authorizing the sale of certain Military Sites" which provided that

> "the Secretary of War be . . . authorized . . . to cause to be sold, such military sites . . . as may become useless for military purposes, *and the jurisdiction which* has been specifically ceded . . . the United States by a State over such sites, shall hereafter cease."

Sharp divergence between acquiring title, and obtaining jurisdiction over lands, with a limitation or qualification to jurisdiction, is, and was when the bases involved here were acquired, the announced policy of the Congress. In 1940, Section 255 of Title 40, United States Code, provided:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head . . . of any agency of the Government may . . . secure from the State . . . consent to or cession of such jurisdiction, exclusive or partial, . . . and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State *or in such other manner as may be prescribed by the laws of the state where such lands are situated.* Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired *as aforesaid* it shall be conclusively presumed that no such jurisdiction has been accepted." (Emphasis supplied.)

What, then, was the "manner prescribed by the laws of the state where such lands are situated" when

Travis, Castle and Oakland bases were acquired by the United States? Obviously, and contrary to the contention of the Solicitor General, this requires examination of California law.

The California statutes in question are set out in full in the Appendix, pp. 203-218, Brief for Appellants. These include Political Code 34 (1872), Government Code 111; Statutes of 1897, Chapter 56, page 51 (Gov. Code 114); the present more comprehensive procedure for acquisition of land, Government Code 126; and Statutes of 1891, Chapter 181, page 262 (Gov. Code 113).

Appellants have clearly and thoroughly given the history and construction of these statutes. (App. Brief pp. 81-148.) With these we are in complete agreement. The District Court in its opinion, however, had stated

> ". . . Stats. 1897, ch. 56, and its related Stats. 1891, ch. 181, p. 262, are 'cession" statutes, and are inapplicable to transfers of jurisdiction to the United States pursuant to the consent-to-purchase method provided in Art. I, Sec. 8, Cl. 17 of the Constitution."

As controlling authority, the Court quoted at length from 23 Ops. Cal. Atty. Gen. 14. We submit that the Attorney General's opinion was manifestly erroneous.

Brief Amici Curiae of the Dairy Industry of California, et al., Section II, concisely sets out the errors of the opinion. We think there is an additional and compelling reason for such conclusion.

The California Attorney General concluded that the 1872 statute "cedes jurisdiction", alleging that

the 1897 statute referred only to lands taken for military purposes "other than constitutionally designated" ones. This, we feel, was based not only on an erroneous reading of the authorities cited, but actually ignored the plain language of the statutes and the legislative intent behind their enactment.

Political Code 34 (1872) provided

> "The legislature consents to purchase . . . by the United States . . . for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings . . ."

This was almost the precise language of Art. I. Sec. 8, Cl. 17 of the Constitution requiring consent of the Legislature of the State

> "for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;" . . .

This was a comprehensive definition by the framers of the Constitution of *all* of the possible military purposes for which land might be used. The California Legislature in 1872 gave its consent to purchase for all such purposes. Thereafter the legislature in Statutes of 1897, Ch. 56, page 51 decided

> "The State of California hereby cedes to the United States . . . exclusive jurisdiction over all lands now held . . . for military purposes or defense, or which may hereafter be ceded or conveyed to the United States for such purposes . . . provided . . ."

Under the interpretation of the California Attorney General (23 Ops. 14), this statute actually has no meaning or effect. Although the phrase "non-consti-

tutional military purposes" is used, he does not recite any such purposes. We are aware of none, and cannot conceive of any. Both the makers of the Constitution and the California legislature in 1872 had already covered the complete military scope in their language.

That the California Attorney General was ignoring the obvious intention of the legislature in 1897 to *qualify jurisdiction* over all military lands is apparent from further reading of the statute. It referred to "all lands . . . which may hereafter be ceded or conveyed." This must, of necessity, since no other construction is possible, have been meant to cover all of the possible means by which *land* could be transferred to the United States for military uses. To "cede", in this context, is to transfer *territory* from one government to another. (*Goetz v. United States*, 103 Fed. 72.) This covered property owned by California and transferred by legislative act. "Conveyed" in both its dictionary and legal definition, simply means "transfer of title" (*Booker v. Castillo*, 154 C. 672) and covers all other transactions (i.e., purchase, gift, condemnation).

It should also be noted that the effect of the Attorney General's opinion is to set up two classes of military lands: one for non-constitutional military uses, requiring the filing of a map or plat as a condition precedent to federal jurisdiction, the other for constitutional military uses which requires no such filing. Even if there were lands which might fall within the first classification, one wonders what possible reason the California legislature would have had in making such a distinction in 1897.

We thus find that the Attorney General has by strained and illogical reasoning, ignoring the all-inclusive language of the Legislature relating both to military use of land and manner of transfer of title, arrived at a conclusion which, if it does not completely negate the 1897 statute, makes it inapplicable to every kind of military land we have knowledge of. The District Court, using that opinion as authority (which it should be noted is at variance with an earlier California Attorney General opinion—NS 3188 (1940)), has now effectively repealed the 1897 enactment.

All of the lands involved here were "conveyed" to the United States within the clear meaning of the 1897 Statute and its successors. Requisite plat filings were admitted, not made for Castle and Travis Bases. We submit that for the reasons given, here and in Appellants' and Amici briefs, the former Attorney General's opinion was wrong; and the District Court in error.

C.

THE DETERMINATION BY THE DISTRICT COURT THAT THE UNITED STATES HAD EXCLUSIVE LEGISLATIVE JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS IS NOT A VALID BASIS FOR DENYING TO CALIFORNIA THE AUTHORITY TO ENFORCE MINIMUM PRICES APPLICABLE TO SALES AND DELIVERY OF MILK BY PRODUCERS TO DISTRIBUTORS WHEN BOTH OF THE PARTIES WERE LOCATED AND ALL ASPECTS OF THE TRANSACTIONS OCCURRED COMPLETELY OUTSIDE OF SUCH RESERVATIONS.

In the preceding discussion, we have limited our argument to the effect of the determination of the

question of whether California has jurisdiction over the military reservations involved here upon the enforceability by California of its minimum *distributor* prices. However, the District Court below, when it made its determination that California did not have jurisdiction over these lands, concluded that, therefore, neither *producer* nor *distributor* minimum prices for milk could be enforced.

It was clear from the evidence before the Court that the minimum producer prices were applied to producers and distributors located entirely outside the military reservations and further that sale and delivery of the milk was made entirely outside of the reservations.

Yet the District Court did not discuss, much less cite authority, for its unprecedented decision that Article I, Section 8, Clause 17 of the United States Constitution denied to California the right to enforce its minimum producer prices.

The interpretation of the words "exclusive legislation" as they are used in Article I, Section 8, Clause 17 of the Constitution does violence to their plain meaning, to their interpretation by this Court, and to the Constitutional concept of a Federal system of government.

We suggest that this extension of the application of this Constitutional provision resulted from some inadvertent confusion with issues raised by the Supremacy Clause (Article VI, Clause 2). For whatever may be the reason, the District Court so decided and we urge it was in error and should be reversed.

CONCLUSION

For the reasons set forth in the Appellants' brief and those upon which we have placed special emphasis in this brief, we urge this Court to make a final determination that it does have jurisdiction over this litigation and, further, that the decision of the District Court be reversed to the end that the State of California may continue to protect the health and welfare of its residents, including military personnel, by enforcement of minimum price regulations applicable to the sale of milk by producers and distributors.

Dated, San Francisco, California,
August 21, 1962.

Respectfully submitted,
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